The WTO's Blind Spot: Dispute Resolution in the International Food Industry

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Introduction

The World Trade Organization (WTO) is the only international body capable of regulating and supervising the international trade that feeds globalization. Large food producers in some of the most powerful trading nations attain so much influence through international trade that they become leaders in corporate governance and the WTO’s resolutions of their disputes have wide-reaching consequences on a worldwide scale. This paper analyzes the importance of the WTO’s role and its dispute resolution process within the international food trade system based on a discussion of the WTO’s dispute resolution of American genetically modified (GM) crops that were forced into the European market. In disputes related to international food trade, the WTO panels should allocate both corporate private rights, public ideals, and sustainability principles within the boundaries set by law. The resulting precedent, in turn, would induce behavioral changes in all WTO signatory nations, and, if legally enforced, promote economics, public health, and environmental protection simultaneously.

I. The WTO Dispute Resolution Process

One key aspect of the WTO’s position in policy making is that the contracts the WTO enters into are binding for all its 190 signatories. As a result, the cases before the WTO are international precedent. More importantly, and within the scope of this paper, is the application of the WTO Dispute Resolution Process to international food law and policy because it influences how food is produced, marketed, traded, and consumed in the 190 signatory nations. Correspondingly, the WTO has enormous power over international food trade and food law.

According to the WTO’s own description, its “procedure underscores the rule of law, and it makes the trading system more secure and predictable.”[2] However, Mitsuo Matsushita, lawyer, professor emeritus of Tokyo University, former WTO Appellate Body member, and panelist in environmental issues before the WTO, finds that the WTO’s Dispute Resolution Process successfully implements its rules rather than its political goals.[3] As a result, the WTO has the widest-reaching potential to influence the practices in its signatory countries through this dispute resolution process. Thus, a mindful approach to settling disputes in the realm of food-related cases would consequently empower the WTO to positively affect the sustainability and safety of worldwide food industries.

The WTO Dispute Resolution Process works in two stages: Panel meetings and appeals.[4] Figure 1 below offers a simplified illustration of the steps involved in this dispute resolution process. The illustration shows the broad steps within the dispute resolution process and pairs its primary steps with the corresponding articles of the United Nations Charter. In essence, the resolution process “is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO’s full membership.”[5] Moreover, the WTO Dispute Resolution Process makes appeals possible.[6] According to the WTO’s own description, however, “[d]ispute settlement is the central pillar of the multilateral trading system, and the WTO’s unique contribution to the stability of the global economy.”[7] The rules imposed on world trade to which the signatory nations agreed would, therefore, remain fruitless without enforcement of the rules through the WTO.

For example, both the European Union and the U.S. are signatories to the WTO and are, thereby, bound by its decisions. When it comes to clashes in food safety principles, the European Union and the U.S. have disparate approaches that fall under the WTO’s
comes to clashes in food safety principles, the European Union and the U.S. have disparate approaches that fall under the WTO’s jurisdiction: Keith Aoki, Professor at the University of California School of Law, explains that there are two approaches for determining the safety of GM crops. On the one hand, opponents to the use of GM crops argue that “[s]uch foods are presumed unsafe until they can be proven safe.”[8] This precautionary principle of food safety is what the Cartagena Protocol suggests and what the E.U. used in its proceedings against the U.S. in the case before the WTO described below. On the other hand, proponents of the GM crop “argue for the principle of ‘substantial equivalence.’”[9] This principle argues that, “to the extent that the chemicals found in non-genetically engineered foods are present in genetically engineered foods, the genetically engineered foods should be presumed to be ‘substantially equivalent’ to non-genetically engineered crops.”[10] The U.S. clearly sides with the substantial equivalence while the E.U. supports the precautionary principle. Which side the WTO favors is ultimately determinative of the approach the WTO’s signatory trading nations have to follow. The caveat is that the WTO’s considerations and bases for decisions are influenced by a variety of unregulated and potentially dangerous factors, including industry lobbying and an imbalance in economic pressures of food industrialists. Consequently, the WTO’s dispute resolution process has enormous effects on the global food industry.

In settling disputes, the WTO makes it clear that it does not pass judgment. This may be one of the problems associated with the WTO dispute settlement process because it does not help the nations in conflict find the “right” way, but only a way without conflict that facilitates future trade. Thus, the WTO does not currently set precedent with public policy goals – but maybe it should. The following discussion of the U.S.’s challenge of the E.U.’s approval and marketing of biotechnology products before the WTO shows why judgment over dispute settlement may yield better precedent and more just results in terms of global food production, safety, and sustainability.
II. Outsmarting Nature or Playing it Safe: Clashing Principles in GM Food Safety

The U.S. is the world leader in GM crop promotion with two thirds of its crops being genetically modified. In contrast, European countries use less than one percent of GM crops worldwide. As described in Part I above, the European Union’s and U.S.’s approach to GM foods are poles apart. While Americans and Asians welcome GM crops, Europe’s reservation to labeling GM crops as “safe” is evident from its rigorous labeling regulations. Professor Fortin, foremost expert on food law explains that this labeling of GM foods “creates an important trade issue for the United States because a large amount of U.S. crops are GM. U.S. firms have opposed such regulations believing they increase production costs and disrupt trade.” As a result, the dispute between the E.U. and the U.S. falls squarely within the WTO’s jurisdiction.

In 2006, the Independent, a British newspaper, reported that the U.S. pressured the E.U. into "open[ing] its markets to genetically-modified food from the U.S. . . . ." American multinational companies bullied the WTO into allowing them to storm the European market and sell their GM crops to European consumers. Although the E.U. presented scientific evidence regarding the potential health concerns associated with GM foods, the WTO “said that a de facto Europe-wide ban, which prevented new corn, cotton and soybean products from entering the European market, was not based on scientific concerns.” In reality, this ruling sounds very much like Big Food’s bullying the WTO into holding that its main producer of GM crops, the U.S., must be able to export food into the European market to make a profit. Again, economics precipitated the WTO’s imbalanced decision and one cannot help but suspect intensive lobbying from the million-dollar U.S. food lobby. In 2012 alone, the agribusiness lobby invested over $30 million and reported 834 lobbyists, of which 432 (more than half) were revolvers. The major GM food producer Monsanto has so much power through its corporate governance of the food industry, that one must question whether the U.S. Food and Drug Administration (FDA), for example, publishes Monsanto’s papers verbatim without review to endorse GM foods. Putting government consumer protection agencies in economic deadlock by threatening to stifle industry funding for research is a common practice of the big American agribusinesses and food industrialist (Big Food). The worst problem in these practices of agribusinesses’ corporate governance is that they are not getting caught and that the governments distribute Big Food’s propaganda. Conversely, the WTO uses manipulated data as bases for its dispute settlements, thereby promoting a pro-Big Food approach to food regulation worldwide.
The lopsided power of Big Food and Monsanto's GM food effectively distorts the science and precedent on which the WTO panelists rely in evaluating the merits of the cases before them. When the WTO rulings align with Big Food's interests, the WTO becomes a tool for the richest industrialists and weakens its powerful role as an international force of balance. After all, the WTO's objective should not be limited to promoting trade but also consider maintaining resources and public health to ensure future trade. Dr. Vandana Shiva, trained physicist, widely published writer, and CEO of Navdanya, debunks the myth that globalization created a knowledge society by pointing out that Big Food, in effect, erases the choice of consumers to choose non-GM foods. In the U.S., for example, GM crops need not be labeled and milk from rBGH (growth hormone)-treated cows, which has been shown to trigger cancer proliferation in humans consuming this milk, also does not need to be labeled as such.[19] Dr. Shiva warns that "[k]nowledge is not the manipulated data of Monsanto."[20] but that myth is precisely what even the world police for food trade, the WTO, believes. Therefore, the WTO must manage the information it acquires through its key role in globalization of the market and evaluate the information in favor of public health and ecological sustainability rather than short-term economic goals.

III. How the WTO's Misjudgment Stormed the European Crop Market

In 2006, the tensions between the E.U. and the U.S. conflicts concerning GM foods culminated in a WTO ruling in favor of the U.S. The basis of the conflict was the 1998 and 2004 blocks of several E.U. member states against GM food from the U.S. "until a new system was in place which would boost traceability and labeling of GM products."[21] Big Food managed to blame several European countries for breaching WTO rules and, thereby, stacked the cards in its favor.[22] The series of cases forcing GM foods onto the European market effectively set international precedent against the biosafety protocol mentioned in Part I and stormed the barriers that could previously contain Big Food's power.

On August 7, 2003, the U.S. requested the establishment of a WTO dispute resolution panel in regard to the U.S.'s complaint about the E.U.'s alleged breach of its obligations under Articles 2, 5, 7 and 8, and Annexes B and C of the SPS Agreement, Articles I, III, X and XI of the General Agreement on Tariffs and Trade (GATT) 1994, Article 4 of the Agriculture Agreement, and Articles 2 and 5 of the Agreement on Technical Barriers to Trade (TBT Agreement).[23] All of these listed sections are parts of international treaties binding on all WTO signatories and nearly all members of the United Nations. These sections also implied the Cartagena Protocol on Biosafety. The WTO found against the E.U. on several counts[24] and thereby issued a pro-Big Food ruling that binds all WTO signatories to allow the nearly unimpeded trade of it GM foods.

In response to the ruling, on December 19, 2006, the E.U. "announced its intention to implement the recommendations and rulings of the [WTO panel] in a manner consistent with its WTO obligations."[25] Thus, the E.U. had to comply with the WTO's ruling and case precedent facilitated an influx of similar cases favoring Big Food's goals. On July 15, 2009, Canada followed the U.S.'s example and filed a similar complaint with the WTO that was settled.[26] Argentina then followed up with a third complaint, which was settled by the WTO in favor of Argentina on March 19, 2010.[27] and was again in line with Big Food's goals. Predictably enough, the countries that attacked the E.U.'s quite reasonable ban on GM foods were the countries with the highest GM crop growth rates and, thus, the same countries with the most incentive to open the European market up to their products. Through manipulation of data, exertion of economic pressures, and lobbying, Big Food managed to set breakthrough WTO precedent in its favor with little regard to the global consequences of potentially unsafe food trade.

Although little concrete information was published on the WTO's implied bias in favor of economics rather than consumer protection in its international trade patrols, the underlying principles can be understood quite easily. James Heyman and Dan Ariely from the University of California at Berkeley, and the Massachusetts Institute of Technology, respectively, "propose that the relationship between compensation and effort hinges on the distinction between two kinds of markets: monetary markets and social markets, which are characterized not only by the type of good or service exchanged but also by the form of compensation offered."[28] In the WTO cases mentioned here, the goods exchanged are GM crops and the compensation is an open European market for U.S.-American, Canadian, and Argentine GM crop sales in Europe. This profit-driven conflict naturally creates monetary incentives and the WTO was bound to fall for the choice to boost international trade – even at the cost of consumers’ health for generations to come. As Professor Ariely explains "[u]sing monetary payments causes participants to invoke monetary-marketplace frames and norms. When money is not involved (i.e., when there is no monetary reward or there is a gift reward), the market is perceived to be a social market."[29] The market that the WTO polices is not a social market but it should act as such. Instead of Big Food's profits, the safety and sustainability of food trade should be the ultimate goal. In other words, rather than making decisions based solely on economic profitability, the WTO should also make decisions based on public health concerns and ecological sustainability.

Conclusion

The previous examples show how the WTO's influence on international food trade indirectly promotes the clashing goals upon which the corporate governance of food trade, on both national and international levels, is founded:

On the one hand, the WTO sets internationally binding precedent in food trade-related disputes that are aligned with free-trade principles. On the other hand, however, the WTO dispute resolution process functions undemocratically in so far as Big Food pressures the WTO into dispute settlements that merely advance the goals of trading partners rather than promoting sustainability, fair employment and balance of trade. Moreover, the WTO's influence on international food trade favors Big Food corporations and their goals to further globalization within the food market with seemingly little consideration for the
environmental consequences of Big Food’s trading partners. In short, the dispute resolution process in food-related trade is heavily tilted in favor of capitalism with little regard for concerns of planetary sustainability. Nonetheless, the WTO must not allow Big Food to stack the cards in its favor at the cost of international food trade and planetary sustainability. If, in the cases of GM food trade barriers, the WTO merged the safety considerations of the Cartagena Protocol with the capitalist ideals of multinational corporations, the WTO panels could ultimately achieve greater market efficiency, and sustain public health and natural resources as well as the individual optimization rights of international trade. In order for the public policy and economic aspects to coexist in the legally binding decisions that originate from the WTO dispute resolution process, the panels should acknowledge their protective function toward the trading partners on the one hand, and the public and global ecological sustainability on the other. Thus, in international food law related disputes, the WTO panels should allocate both corporate private rights and socialist ideals. Rather than manipulating international treaties in favor of corporate governance, disputing trade partners should bargain over settlement outcomes within legal boundaries set by international treaties. The resulting precedent, in turn, would induce behavioral changes in all WTO signatory nations, and, if legally enforced, promote economics, public health, and environmental protection simultaneously.

If nothing is done to raise the level of the WTO’s accountability in regards to public health and ecological sustainability in matters of international food trade, Big Food’s international business which the WTO attempts to protect will eventually deplete the resources necessary for its own existence. Simply looking at the cases described above, for instance, Monsanto has created a seed and crop monopoly, which creates monocultures of GM crops that both kill other species and destroy the arable land in which they are planted. On an even larger scale, Big Food’s corporate governance manipulates the WTO to open up new markets for GM crops, produced by corporations such as Monsanto into the European market and thereby creates a self-feeding system of unsustainable food production and trade on a global level. Although this may seem like a lucrative business plan for the multinational food producers trading globally, if the WTO does not step in to rebuild nature’s economy, those corporations will eventually cannibalize themselves and lead the whole food system to collapse. Thus, the WTO needs to construe already available laws, such as the Cartagena Protocol, in a way as to not only protect public health, biodiversity, sustainable agriculture, and fair trade, but also those companies that currently manipulate the WTO and govern the food industry.

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[4] Id.


[6] Id.

[7] Id.


[9] Id.

[10] Id.


[15] Id.


[17] Id.


[22] Id. (“American sources also said that the WTO had found that six individual states – France, Germany, Austria, Italy, Luxembourg and Greece – broke the rules by applying their own bans on marketing and importing GMOs”).


[24] The WTO’s findings were summarized as follows:

With regard to the product-specific EC measures, the panel found that the European Communities had acted inconsistently with its obligations under Annex C(1)(a), first clause, and Article 8 of the SPS Agreement in respect of the approval procedures concerning 24 out of 27 biotech products identified by the complaining parties because there were undue delays in the completion of the approval procedures for each of these products. The panel found, however, that the European Communities had not acted inconsistently with its obligations under any other provisions raised by the complaining parties, including Articles 5.1, 5.5 and 2.2 of the SPS Agreement, with regard to any of the products concerned.

With regard to the EC member State safeguard measures, the panel found that the European Communities acted inconsistently with its obligations under Articles 5.1 and 2.2 of the SPS Agreement with regard to all of the safeguard measures at issue, because these measures were not based on risk assessments satisfying the definition of the SPS Agreement and hence could be presumed to be maintained without sufficient scientific evidence.

DS291, supra note 12.

[25] Id.


[29] Id.

Posted in: Volume 11, Issue 4